

STATE OF MICHIGAN
COURT OF APPEALS

RAE JEAN ADKINS,

Plaintiff-Appellant,

v

GINA LYNNE DICK,

Defendant-Appellee,

and

TIAA-CREF, LLC,

Defendant.

UNPUBLISHED
September 6, 2011

No. 297820
Kent Circuit Court
LC No. 09-010105-CZ

RAE JEAN ADKINS,

Appellant,

v

GINA LYNNE DICK, as personal representative
of the ESTATE OF LARRY THOMAS WELCH,

Appellee.

No. 298945
Allegan Probate Court
LC No. 10-056180-DE

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

This is a consolidated appeal arising out of a dispute regarding the rights to certain annuity proceeds. In Docket No. 297820, plaintiff Rae Jean Adkins appeals by leave granted the Kent Circuit Court's order granting summary disposition to defendant Gina Dick, personal representative of the Estate of Larry Thomas Welch, pursuant to MCR 2.116(C)(8) on the ground that Adkins had no standing to bring her claims. In Docket No. 298945, Adkins appeals as of right the Allegan Probate Court's dismissal of her petition for supervised administration of the estate, removal of Dick as personal representative, and a stay of proceedings on the ground that Adkins lacked standing because she was not an interested person in the estate. We affirm the

probate court's dismissal in Docket No. 298945. Likewise, we affirm the circuit court's dismissal in Docket No. 297820, but remand for correction of its order.

I. FACTS

A. BACKGROUND

Plaintiff Adkins is the sister of Larry Welch, who died of brain cancer in July 2009. Defendant Dick is the personal representative of the Welch's estate and one of Welch's three adult children. Before his death, Welch had two retirement annuities, both held by defendant TIAA-CREF, LLC. Only one annuity is at issue in this case. Since 2001, Adkins was the primary beneficiary of the annuity, and Dick and her siblings were the secondary beneficiaries. But four days before he died, Welch signed a change of beneficiary form, making Dick and her siblings the primary beneficiaries of the annuity. In her complaint, Adkins alleged that the annuity was worth approximately \$250,000. At the heart of this appeal is Adkins' effort to have this change of beneficiary designation disregarded so that the funds in the annuity retirement account will be paid to her rather than Welch's children, who Adkins claims used duress, coercion, and fraud to induce Welch to name them as the primary beneficiaries. Evidently, the annuity funds are still being kept by TIAA-CREF.

Welch divorced the mother of Dick and her two siblings in 2000. Adkins alleged as follows:

Welch did not have a close relationship with his three children following the divorce in 2000, and usually only saw them once a year during the Christmas season. All three children were estranged from their father, upset about issues related to their parents' divorce.

Adkins further alleged that Welch was very vocal about wanting to leave the annuity to her, a widow, and was also "very vocal and open about his plan to leave no money or assets to any of his adult children." Adkins also alleged that Welch and Dick had confrontations over this issue in the years before his death.

According to Adkins, Welch began to show signs of some "mental/neurological disorder" in late 2008 or early 2009. While he was visiting Adkins in Kentucky in the spring of 2009, Welch became ill and went to a hospital for an evaluation. In June 2009, he was diagnosed with brain cancer in the area controlling memory and cognition and was given two months to live. Adkins and Deanne Savage, Welch's then fiancée, wanted Welch to remain in Kentucky but Dick and her siblings insisted on bringing him back to Michigan.

On July 3, 2009, Welch was placed in a hospice facility in Byron Center. Adkins alleged that "Welch was heavily sedated, and did not seem to comprehend what was going on around him for the last two weeks leading to his death." Adkins also alleged that just a couple of days before Welch died, "Dick put a global power of attorney (and/or the change of beneficiary form) in front of her dying father, whose eyes were closed, and told him something to the effect that he had to sign it so 'she could pay all his medical bills . . .' which was not true."

When Adkins asked TIAA-CREF for the annuity proceeds, it declined to pay on the basis of the change of beneficiary form. But TIAA-CREF did agree to interplead the funds into the court until a determination as to the proper beneficiary is made.

B. CIRCUIT COURT PROCEEDINGS (DOCKET NO. 297820)

In September 2009, Adkins originally filed her complaint in the Kent Circuit Court. Adkins later amended her circuit court complaint, alleging that Dick would be unjustly enriched if she received the proceeds from the annuity and asking the circuit court to enjoin TIAA-CREF from distributing the annuity proceeds and to impose a constructive trust over those proceeds for her benefit. Adkins alleged the following counts: Count 1—attempted conversion, Count 2—tortious interference in contractual relations, Count 3—breach of contract against TIAA-CREF, Count 4—breach of fiduciary duty and breach of contract against Dick, and Count 5—“Injunctive and Equitable Relief, Award of Damages.”

Dick moved for summary disposition on the ground that Adkins had failed to state a claim. She argued that there was no such action as “attempted conversion.” She also argued that the tortious interference, breach of fiduciary duty, and breach of contract claims could not be maintained because Adkins had no contract with TIAA-CREF or with Dick, and Dick had no fiduciary duty to Adkins. Furthermore, she argued that Adkins did not have standing to raise any claims on behalf of the Welch’s estate, but “[e]ven if she did, the Probate Court would have exclusive jurisdiction over such claims. MCL 700.1302(a)(iii).”

The circuit court found that Adkins lacked standing because the wronged party was Welch’s estate and the action belonged in probate court. The circuit court explained its ruling as follows:

Upon thorough examination and thoughtful consideration, this Court finds that it is not the proper forum for this case. In no way is this Court’s decision a judgment of the merits of Adkins’ allegations.

Accepting the allegations as true, as is required under MCR 2.116(C)(8), this Court finds that the wronged party is Welch’s estate, not Adkins. Again, accepting the allegations as true, it was Welch’s intent and wishes that were disrupted and disregarded. Additionally, this Court agrees with Dick that Adkins had neither a vested nor a contractual interest in the annuity. Therefore, Adkins has no standing and her several claims fail as a matter of law.

Finding that the wronged party, if any, is Welch’s estate, this Court finds that the appropriate jurisdiction for any claims on behalf of his estate is in Probate Court. In addition to jurisdiction under MCL 700.1302, as noted by Dick, MCL 700.1303 grants the Probate Court expanded jurisdiction to deal with potential

issues arising out of Adkins' allegations, including imposing a constructive trust.^[1]

The circuit court ordered TIAA-CREF not to disburse the funds until further order from it or from "the appropriate Probate Court." The circuit court then ruled the case be "dismissed in its entirety, without prejudice." The circuit court further explained its ruling as follows:

I am dismissing without prejudice on the assumption that these issues can be raised in probate court. If they cannot, or if a court—they deem they cannot address these issues there, then, [plaintiff's attorney], you can certainly refile and bring it back here. But I do believe that this is where it belongs.

C. PROBATE COURT PROCEEDINGS (DOCKET NO. 298945)

In January 2010, Dick was appointed personal representative of Welch's estate. Adkins later petitioned the probate court for supervised administration of the estate, removal of Dick as personal representative, and a stay of proceedings pending resolution of this appeal. The probate court denied the petition on the ground that Adkins was not an interested person in the estate and lacked standing.

Adkins then filed the claim of appeal in this Court. Dick moved to dismiss that claim of appeal, arguing that this Court lacked subject matter jurisdiction because MCR 5.801(A) provides that "[a]n interested person aggrieved by an order of the probate court may appeal as provided by this rule," but that Adkins did not fall within the definition of an "interested person" as that term is defined in § 1105 of the Estates and Protected Individuals Code² or in MCR 5.125. This Court denied that motion on the ground that "the examples of an 'interested person' provided by MCL 700.1105(c) are plainly non-exhaustive" and "it appears at least arguable that appellant may be a 'claimant' within the meaning of MCR 5.125(C)(11)."³

II. DOCKET NO. 298945

As discussed at oral argument and essentially conceded by the parties on both sides,⁴ the probate court had no jurisdiction to hear Adkins' claims because the annuity is not an asset of the probate estate. Thus, even assuming that Adkins could be classified as an interested party⁵ or

¹ Citing MCL 700.1303(1)(g).

² MCL 700.1105(c).

³ *In re Welch Estate*, unpublished order of the Court of Appeals, entered October 8, 2010 (Docket No. 298945).

⁴ Although Adkins' counsel waffled on this point at oral argument, on page 5 of her brief on appeal in Docket No. 298945, Adkins concedes that "[t]he money at issue is held in an annuity, and is not an estate asset, but rather a contract right."

⁵ MCL 700.1105(c).

claimant⁶ of the estate (which we need not decide here), her alleged right to the annuity funds could not be litigated in probate court, as the annuity passes to the named beneficiaries separate from any estate assets. Accordingly, we affirm the probate court's order of dismissal for lack of jurisdiction.

III. DOCKET NO. 297820

A. STANDARD OF REVIEW

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. Under this motion, the legal basis of the complaint is tested by the pleadings alone.⁷ All factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party.⁸ The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.⁹ This Court reviews de novo a trial court's ruling on a motion for summary disposition.¹⁰ This Court also reviews de novo jurisdictional issues and questions of standing.¹¹

B. COUNT 1

With respect to Count 1—attempted conversion—Adkins alleged as follows:

54. Defendant Dick wrongfully exercised dominion over Plaintiff's funds, held in trust by her as a fiduciary, and tried to appropriate the funds for her own use contrary to his clearly stated desires, and in face of his lack of competence to make decisions.

55. Therefore, Plaintiff is entitled to recover the funds she attempted to convert, valued at approximately \$250,000, from Defendant Dick, through the annuity to be interpleaded by Defendant TIAA-CREF.

56. Defendant Gina Dick used her control of the Power of Attorney and her father's physical person to attempt to transfer, receive, and aid in the concealment of the converted funds to herself and her two siblings.

⁶ MCR 5.125(C)(11)(d).

⁷ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

¹¹ *State Farm Mut Ins Co v Broe Rehab Servs*, 289 Mich App 277, 279; ___ NW2d ___ (2010).

57. Therefore, pursuant to MCL § 600.2919a, Plaintiff is entitled to recover treble damages from Defendant Gina Dick attempting to receive and aid in the concealment of the converted funds, totaling \$750,000.00 plus costs and attorney fees.

“In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.”¹² “The gist of conversion is the interference with control of the property.”¹³ Originally, actions for conversion were limited to tangible chattels, but over time, the doctrine of conversion was extended to include intangible rights.¹⁴ However, in either instance, a plaintiff must establish an exclusive right of ownership to the allegedly converted property.¹⁵

Here, Adkins was originally named as a beneficiary of the annuity in the event that Welch died before the annuity payments began. But, pursuant to the annuity contract, Welch was free to change that beneficiary designation at any time before his death. Specifically, the annuity at issue states:

This is a deferred annuity contract. It will provide a life annuity for you as the Annuitant or, if you so elect, an annuity for you and another payee. If you die before your annuity payments begin, a death benefit payable as income will be provided for your Beneficiary.

* * *

You may change your Beneficiary . . . within the limits stated on the following pages.

* * *

9. . . . The Annuitant may designate or change the Beneficiary by giving written notice to TIAA at its home office in form and wording satisfactory to TIAA

We conclude that Adkins has not pleaded the requisite elements of conversion because she has failed to establish an exclusive right of ownership to the allegedly converted property. That is, merely being named as a beneficiary upon death did not give Adkins an exclusive right to the annuity payments; she merely had an expectancy.¹⁶ Any beneficiaries’ rights to the

¹² *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

¹³ *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997).

¹⁴ *Id.* at 585-586, citing Prosser & Keeton, Torts (5th ed), § 15, p 102.

¹⁵ *Id.* at 586.

¹⁶ 4 Am Jur 2d Annuities § 24 (“Under an annuity contract in which an annuitant reserves to himself or herself the incidents of ownership, including the right to assign the contract and change the beneficiary, the beneficiary has only an expectancy, and not a vested interest.”)

annuity payments did not vest until Welch's death.¹⁷ Therefore, albeit for the wrong reason,¹⁸ the lower court's dismissal of her circuit court cause of action as to this count was proper.

C. COUNT 2

Regarding Count 2—tortious interference in contractual relations—Adkins alleged as follows:

59. Plaintiff had business relationship or expectancy with a third party, Larry T. Welch and his annuity company, TIAA-CREF as primary beneficiary of Larry T. Welch's annuity.

60. Defendant Gina Dick deliberately provided false information to the decedent, and/or exploited his obvious mental incompetency to obtain a power of attorney, and further to get him to physically sign a change of beneficiary document fraudulently in order to remove her aunt, Plaintiff Rae Jean Adkins as beneficiary to the annuity policy of decedent.

61. The beneficiary relationship had a reasonable likelihood of future economic benefit to Plaintiff, to wit, award of approximately \$250,000 annuity at the time of the death of Larry T. Welch.

62. Defendant Gina Dick was aware of this business expectancy at the time of the interference, i.e., the status of Plaintiff Rae Jean Adkins as a beneficiary on this annuity account.

63. Defendant Gina Dick intentionally interfered with the business relationship and expectancy by attempting to divert it to herself and her two siblings.

64. Defendant Gina Dick improperly interfered with the business relationship or expectancy.

65. Defendant Gina Dick's conduct caused the third party (ies) to disrupt or terminate the prospective economic relationship/expectancy.

66. Defendant Gina Dick's actions caused Plaintiff harm and damage, including lost annuity payments.

67. That as a direct and proximate result of Defendant Gina Dick's unlawful action against Plaintiff as described, Plaintiff has sustained injuries and damages,

¹⁷ *Id.*; see also *Helms v LeMieux*, 286 Mich App 381, 389; 780 NW2d 878 (2009), reversed on other grounds, 486 Mich 937 (2010).

¹⁸ *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005).

including, but not limited to, ongoing loss of annuity payments; mental and emotional distress [sic].

The three elements of a cause of action for tortious interference with a contract are (1) a contract, (2) a breach, and (3) the defendant's instigation of the breach without justification.¹⁹ Similarly, a prima facie case of tortious interference with a business relationship or expectancy requires (1) the existence of a valid business relationship or expectancy; (2) that the defendant knew of the relationship or expectancy; (3) an intentional interference by the defendant that induced or caused a breach or termination of the relationship or expectancy; and (4) damage to the plaintiff.²⁰

Adkins has failed to state a claim for tortious interference with a contract because the only contract at issue is the annuity contract between Welch and TIAA-CREF. Adkins never had a contract with Welch or a contract with TIAA-CREF. Because the beneficiaries could be changed at any time during Welch's life, Adkins was merely a designated beneficiary with no vested interest. That is, she was merely an incidental beneficiary in the event of Welch's death with no rights to enforce the annuity contract.²¹ Likewise, we conclude that she failed to state a claim for tortious interference with a business relationship or expectancy because there simply was no *business* relationship or expectancy created by her designation as an incidental beneficiary to an annuity contract. The facts of this case did not involve, for example, an employment relationship nor an agreement for the exchange of goods, property, or services. Although Adkins may have expected some economic advantage upon Welch's death, her expectation cannot fairly be termed a business relationship with Welch or TIAA-CREF. Therefore, albeit for the wrong reason,²² the lower court's dismissal of her circuit court cause of action as to this count was proper.

D. COUNT 3

Turning to Count 3—breach of contract against TIAA-CREF—Adkins alleged as follows:

68. As the properly designated beneficiary, Plaintiff Rae Jean Adkins is entitled to receive the proceeds of the TIAA-CREF annuity in the amount of approximately \$250,000 outlined above.

69. Notwithstanding Plaintiff's Adkins' [sic] rightful claim, TIAA-CREF has failed to distribute the proceeds of this annuity to Ms. Adkins.

¹⁹ *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992).

²⁰ *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010).

²¹ *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 429; 670 NW2d 651 (2003) ("Only intended beneficiaries, not incidental beneficiaries, may enforce a contract[.]")

²² *Tipton*, 266 Mich App at 37-38.

70. As the fiduciary administering claims under the TIAA-CREF policy is a proper defendant in a claim for the annuity benefits [sic].

71. Therefore, it would be appropriate for the Court to order TIA-CREFF [sic] to pay Plaintiff Adkins the full proceeds of the annuity, together with appropriate interest and reasonable attorney fees, and/or interplead them into this Court pending resolution of these claims.

Adkins' claims are premised on her entitlement to receive the annuity funds. However, as we have explained, Adkins had no right to the annuity funds before Welch's death, and, at the time of Welch's death, she no longer was listed as the primary beneficiary. Therefore, TIAA-CREF was not required to, and indeed was prohibited from, distributing the funds to Adkins, a non-beneficiary under the terms of the contract upon Welch's death. Therefore, albeit for the wrong reason,²³ the lower court's dismissal of her circuit court cause of action as to this count was proper.

E. COUNT 4

Count 4 of Adkins' complaint alleged breach of fiduciary duty and breach of contract against Dick. Specifically, she alleged as follows:

73. By obtaining the Power of Attorney by fraud and duress, and then using it to gain benefit for herself, and to use exploitation of her father's mental incapacity to change the annuity beneficiary designation and make herself and her adult siblings the primary beneficiaries on the TIAA-CREF annuity account contrary to the decedent's wishes and using a Power of Attorney executed when he was not competent, Defendant Gina Dick engaged in undue influence, and breached fiduciary duty to the estate of Larry T. Welch and engaged in self-dealing inimical to his intent, and thereby wrongfully breached the contract entitling Plaintiff to money damages and award of the annuity.

74. That as a direct and proximate result of Defendant Gina Dick's unlawful action against Plaintiff as described, Plaintiff has sustained injuries and damages, including, but not limited to, ongoing loss of annuity payments; mental and emotional distress; cost and attorneys' fees.

With respect to Count 4, we again conclude that Adkins failed to state a claim because she was not a party to the annuity contract nor did she have a vested interest in the contract. Therefore, the lower court correctly dismissed Adkins' circuit court cause of action as to this count.

²³ *Id.*

F. COUNT 5

With regard to Count 5—“Injunctive and Equitable Relief, Award of Damages”—Adkins alleged as follows:

76. Plaintiff Adkins was Mr. Welch’s intended beneficiary with regard to the TIAA-CREF annuity at the time of Mr. Welch’s death.

77. In good conscience, the proceeds of the TIA-CREF [sic] annuity belong to Plaintiff Ms. Adkins.

78. In good conscience, the proceeds of this annuity do not belong to Defendant Ms. Dick.

79. Defendant Ms. Dick would be unjustly enriched if she received the proceeds of this annuity that belong in good conscience to Plaintiff, Ms. Adkins.

80. The proceeds of the TIAA-CREF annuity is [sic] identifiable and traceable to the funds presently held by TIAA-CREF.

81. It would be just and equitable for the Court to impose a constructive trust over the TIAA-CREF funds for the benefit of Ms. Adkins, requiring the transfer of the funds to Ms. Adkins immediately upon distribution by TIAA-CREF.

82. It also would be just and equitable for the Court to enjoin TIAA-CREF from distributing or otherwise dissipating the annuity proceeds before they can be placed into a constructive trust for the benefit of Ms. Adkins.

83. Such injunctive and equitable relief is appropriate.

Adkins’ stated allegations in Count 5 fail to state any cognizable claim. Her allegations are merely an extended request for relief. Therefore, albeit for the wrong reason,²⁴ the lower court’s dismissal of her circuit court cause of action as to this count was proper.

G. WITH PREJUDICE

As stated, even accepting as true all well-pleaded allegations in Adkins’ amended complaint, we conclude that she has failed to state any claims upon which relief could be granted and, therefore, the circuit court properly dismissed her cause of action. However, we conclude that the circuit court erred in ruling that its dismissal under MCR 2.116(C)(8) was without prejudice. This Court has made clear that “a grant of summary disposition under subrule C(8) should always be *with prejudice*.”²⁵ As this Court has explained, “summary disposition under

²⁴ *Id.*

²⁵ *ABB Paint Finishing v Nat’l Union Fire Ins Co*, 223 Mich App 559, 563; 567 NW2d 456 (1997) (emphasis added).

C(8) is necessarily a decision on the merits. To grant such a motion ‘without prejudice’ is . . . incongruous. That is the equivalent of saying that the plaintiff’s claim is without legal merit but he may refile the exact same claim.” Accordingly, we remand this case for correction of the circuit court’s order to state that its grant of dismissal is *with prejudice*.

IV. CONCLUSION

In sum, in Docket No. 297820, we affirm the circuit court’s dismissal of Adkins’ cause of action. However, we remand for correction of the circuit court’s order to state that dismissal is *with prejudice*. Dick, being the prevailing party, may tax costs pursuant to MCR 7.219. In Docket No. 298945, we affirm the probate court’s order of dismissal. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens